86-517

Supreme Court, U.S.
FILED
SEP 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

GRAYDON ROGER BOLES,

PETITIONER,

v.

T.E. ELLIS, T.D. COX, & DANNA MULLINIX,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Graydon Roger Boles
10117 North Tenth Street
Tampa, Florida 33612
(813) 972-3093

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the lower court abused its discretion by not granting Rule 60 (b) (3) relief prior to a trial of this case?

2. Whether subsequent judgment in which cost were taxed against petitioner will be allowed to stand since issues pertaining to fraud and 6th Amendment deprivations were barred by virtue of respondent Mullinnix's dismissal from this lawsuit?

TABLE OF CONTENTS

Jurisdictional Statement ..... 1

Statement of the Case ..... 1

Reasons for granting the writ ..... 2

AUTHORITIES

Dommer v. Hatcher 427 F. Supp. 1040 reversed on other grounds 538 F. 2d 1031 ..... 4

Down v. Sawtelle 574 F. 2d 1, cert. denied, 99 S.Ct. 278 439 U.S. 910, 58 L. Ed. 255 ..... 4

Kauffman v. Moss 420 F. 2d 1270 cert.denied 400 U.S. 846, 27 L.Ed. 2d 84, 91 S.Ct. 93 ..... 3

United States v. Price 86 S.Ct. 1152, 383 U.S. 787, 16 L.Ed. 2d 267 ..... 2

Constitutional Amendments IV, VI, XIV ..... 1

State Statutes N.C.G.S. 14-134 & 14-444 ..... 1 (appendix H & I)

Opinion below (unpublished) ..... appendix F

Order denying rehearing ..... appendix G

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. _____

---

GRAYDON ROGER BOLES,

PETITIONER,

v.

T.E. ELLIS, T.D. COX, &
DANNA MULLINIX,

RESPONDENTS.

---

PETITION FOR WRIT OF CERTIORARI TO THE UNITED

STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

---

The petitioner, Graydon Roger Boles, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on May 15, 1986.

## JURISDICTION

The jurisdiction of this court is invoked pursuant to the authority of Title 28 U.S.C.A. Section 1254 (1).[1]

## CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitutional Amendment IV:
The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . .

U.S. Constitutional Amendment VI:
. . . to be informed of the . . . cause of the accusation . . .

U.S. Constitutional Amendment XIV:
. . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

## STATE STATUTES INVOLVED

North Carolina General Statutes Sections 14-134 and 14-444.

## STATEMENT OF THE CASE

Petitioner brought this action against respondents prior to his conviction in State Court pursuant to the authority of Title 28 U.S.C.A. Section 1343. Magistrate Eliason submitted erroneous fact findings and bias recommendation August 1, 1985. (appendix A & B) Petitioner responded by objection. Counsel for respondent Mullinnix alleged evidence submitted was inadmissable. The District Court allowed respondent Mullinnix's Motion For Summary Judgment and Motion to Dismiss.[2] The lower ruled upon petitioners written Rule 60 (b) (3) request disregarding the fact that respondent Mullinnix's affidavit in

---

[1]Petition for rehearing was denied June 2, 1986.

[2]Petitioner told State Court Judge Wood that he had not entered premise after having been forbidden to do so and that he had not cussed or offered to fight co-respondent Ellis. The State Court affirmed the departure from constitutional mandate amendment 6 thus raising the federal question as to whether petitioner was mislead. Petitioner's appeal was rejected by virtue of his pro-se status. (State Ct. Transcript pp. 62, 8-10; pp. 69, exception noted, 12-18)

support of his Motion for Summary Judgment was submitted in bad faith. (appendix C) Petitioner appealed and moved for an order staying trial pending appeal. (appendix D & E) Trial was held March 24, 1986 wherein evidence previously excluded was admitted and other evidence excluded which was previously admitted. Lower court took the case from the jury upon the ground of insufficient evidence and thereafter ruled against petitioner's case.

## REASONS FOR GRANTING THE WRIT

The lower court has abused its discretion by dismembering the conspiracy complained of and by excluding evidence which proves case beyond a shadow of a doubt. "The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." Consequently, a miscarriage of justice has occurred since the lower refused to take action on the following set of facts and barred them by virtue of a conviction which was obtained by fraud and other improper means.

1. Petitioner was charged and tried for entering the premise in the lawful custody of respondent Mullinnix after having been forbidden to do so without a license to do so and was found guilty in State District Court.[3]

2. Petitioner was charged and tried for cussing and offering to fight respondent Ellis and found guilty in State District Court. (pleading no. 1, exhibit no. 1)

3. Respondent Mullinnix has sworn that he knew of no one who forbade petitioner to enter premise after having been forbidden to do so. (pleading no. 27, entry 5)

4. Respondent Mullinnix has sworn that he was not working the date arrest took place. (State Ct. transcript pp. 7, 10-12)

5. Respondent Mullinnix has sworn that he was not in charge the date arrest took place. (State Ct. Transcript, pp. 9, 17-18)

---

[3]"Any notion that a private person is necessarily immune from liability under section 1983 because of the 'under color of' requirement of the statute was put to rest by our holding in United States v. Price [86 S.Ct. 1152, 383 U.S. 787, 16 L. Ed. 2d 278]. There, in the context of a conspiracy, the court said: To act under color of law does not require that the accused be an officer of the state. It is enough that he is a willful participant in joint activity with the state."

6. By affidavit in support of respondent Mullinnix's Motion for Summary Judgment it is alleged that he was working the date of arrest. (pleading no. 96, entry 1)

7. Respondent Ellis admitted at Superior Court trial that he did not in fact know what petitioner was saying the date of arrest. (State Ct. Transcript pp. 15, 25; pp. 16, 1)

8. Respondent Mullinnix fraudulently testified in Superior court denying having knowledge of petitioner's credit at said establishment when he did in fact have knowledge of such credit prior to trial in November 1983. (State Ct. Transcript pp. 12, 20-23 and pleading nos. 12 and 27 entries 3 & 4)

9. All respondents have admitted that petitioner was being restrained the date arrest took place. (State Ct. Transcript pp. 6, 12-15; pp. 17, 6-7; pp. 28, 1-3) (appendix H)

10. Respondent Mullinnix changed his testimony in Federal Court pertaining to the number of people restraining petitioner in order to bar recovery for injuries inflicted by co-conspirators. (State Ct. Transcript pp. 6, 6-20; pleading no. 110, entry 32)

11. Petitioner was not informed of the cause of the accusation (lying in doorway) to be used against him until Superior Court proceedings were well underway. (State Ct. Transcript pp. 17, 3-8) (appendix I)

12. Respondent Cox swore that respondent Mullinnix stated that he had told petitioner to leave when in fact respondent Mullinnix told petitioner to remain inside.[4] (State Ct. Transcript pp. 28, 11-13; pp. 7, 18-19)

13. Petitioner was not informed of the cause of the accusation (refusing to leave) to be used against him until Superior Court Trial was well underway. (State Ct. Transcript pp. 6, 6-20; pp. 28, 11-14)

14. Petitioner was not informed of the cause (shouting or rudely insulting others) to be used against him until Superior Court Trial was underway.

Whatever factors of policy and fairness militate in favor of extending sovereign immunity to private persons acting in concert with state officials were resolved in favor of those who claim a deprivation of con-

---

[4]"Claims of a conspiracy by state officers to convict a persion of a crime by knowing use of a perjured testimony are not categorically deficient in stating a claim under the civil rights act. Kauffman v. Moss 420 F2d 1270 cert denied, 400 U.S. 846, 27 L. Ed. 2d 84, 91 S. Ct. 93."

stitutional rights. A private individual shown to have acted in concert with officials may not rely upon any type of qualified immunity derivately or otherwise. Downs v. Sawtelle, 574 F. 2d 1, cert. denied, 99 S. ct. 278, 439 U.S. 910, 58 L. Ed. 255.

> If the original charge is abandoned probable cause cannot avail to aid the party making the charge in support of a subsequent charge of an entirely different offense.[5] The question of lack of probable cause for trespass prosecution must be determined in accordance with whether the facts and circumstances within the knowledge of the defendant at the time he instituted the criminal trespass prosecution were sufficient to induce a reasonably prudent man to believe that plaintiff was guilty of offense charged.

"If further investigation is needed after arrest, police have arrested without requisite probable cause and the individual must be released; if probable cause is in doubt, the investigation must precede arrest; anything less is a serious infringment of ones right to be secure in one's person. Dommer v. Hatcher, 427 F. Supp. 1040, reversed on other grounds, 638 F. 2d 1031."

The Fourth Circuit is of the opinion that petitioner appealed from a ruling of District Court refusing to reconsider the entry of summary judgment in favor of respondent Mullinnix. (appendix F & G) Petitioner moved pursuant to Rule 60 of the Federal rules of Civil Procedure and used the fact that respondent's affidavit in support of summary judgment was submitted in bad faith to place emphasis on the fact that fraud was upon the court. Petitioner is of the opinion that Rule 60 request are appealable.

Wherefore petitioner prays again for a writ to issue to review the judgment afore mentioned.

Graydon Roger Boles

Graydon Roger Boles
10117 North Tenth Street
Tampa, Florida 33612

---

[5]Petitioner was charged at onset for assault on a female. (State Ct. Transcript pp. 5, 15-18; pp. 16, 5-6)

# APPENDIX

A. ..... Magistrates Finding and Recommendation

B. ..... Court Order Date Stamped September 19, 1985

C. ..... Memorandum Date Stamped March 5, 1986

D. ..... Motion to Stay Pending Trial

E. ..... Court Order Date Stamped March 17, 1986

F. ..... Fourth Circuit Per Curiam Opinion

G. ..... Fourth Circuit Order Denying Rehearing

H. ..... N.C.G.S. Section 14-134

I. ..... N.C.G.S. Section 14-444

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

| | | |
|---|---|---|
| GRAYDON ROGER BOLES, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | C-83-613-G |
| | ) | |
| T. E. ELLIS, T. D. COX and DANNA MULLINNIX, | ) | |
| | ) | |
| Defendants. | ) | |

MAGISTRATE'S FINDINGS AND RECOMMENDATION AND ORDER

This matter comes before the Court on defendant Mullinnix's motion for summary judgment. On June 27, 1983, plaintiff was arrested on charges of trespass, and being intoxicated and disruptive. He was tried by a North Carolina district court on September 29, 1983 and found guilty of both charges. On appeal to the superior court, on November 16, 1983, plaintiff was again convicted on both charges after a jury trial de novo. (Pleading no. 96.)

Subsequently, plaintiff filed the instant action alleging that the named defendants conspired to, and did, violate his constitutional rights in connection with his arrest and convictions. As to defendant Mullinnix, a private individual, plaintiff alleges that he conspired with state officers (police) to maliciously prosecute him. (Complaint; Pleading no. 68.) Although the complaint alleged a cause of action pursuant to 42 U.S.C. § 1985, this Court, in a prior Order, dismissed all claims under section 1985 for failure to state a claim and, instead, found plaintiff's claims to come under 42 U.S.C. § 1983. (Pleading no. 68.) Thus, as this action now stands, plaintiff alleges that defendant Mullinnix conspired with police to, and did, maliciously prosecute him in violation of 42 U.S.C. § 1983.

Defendant's motion for summary judgment is expressly based on the argument that plaintiff's state court convictions bar an action for malicious prosecution. (Pleading nos. 95-97.) Plaintiff opposes the

motion by arguing that a state conviction is not a sufficient basis for dismissal of a malicious prosecution claim. (Pleading no. 101.) After carefully reviewing the arguments of the parties, the Court finds that defendant's motion should be granted.

Violations of 42 U.S.C. § 1983 are determined under federal substantive law. **Pierson v. Ray,** 386 U.S. 547, 558 n.12, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); **Tucker v. Duncan,** 499 F.2d 963, 965 n.1 (4th Cir. 1974). In the case of an action brought for malicious prosecution, federal common law is the federal substantive law to be applied. **See Morrison v. Jones,** 551 F.2d 939, 940 (4th Cir. 1977) (adopting Virginia law). The Fourth Circuit holds that under federal common law a necessary element of an action for malicious prosecution is termination of the criminal proceedings favorable to the accused. **Id.** This was the rule at common law and is the rule in every jurisdiction in the United States. **Shulman v. Miskell,** 626 F.2d 173, 174 (D.C. Cir. 1980); **Dunn v. Tennessee,** 697 F.2d 121, 126 (6th Cir. 1982), **cert. denied,** 460 U.S. 1086 (1983). Therefore, this is the rule of law this Court is bound to apply to the instant case.[1] Since plaintiff was convicted of the charges

---

[1]Plaintiff argues that under North Carolina law, a conviction obtained by fraud or other unfair means does not bar a subsequent action for malicious prosecution. He argues that this exception should be applied in the instant case because defendant fraudulently testified in the district court that he was in lawful custody of the subject premises and falsely testified in the superior court that he did not serve plaintiff on the night of his arrest. (Pleading nos. 72; 81; 103.) The Court finds plaintiff's arguments without merit.

Although plaintiff correctly cites North Carolina law, **see Falkner v. Almon,** 22 N.C. App. 643, 207 S.E.2d 388, 389 (1974), it is federal common law, not state law, that controls in this action and plaintiff has failed to direct the Court's attention to any authority stating that under federal common law the alleged exception applies. The Court notes that in **Morrison v. Jones,** 551 F.2d 939, 940 (4th Cir. 1977), the Fourth Circuit adopted Virginia law's elements for a malicious prosecution action as the federal common law, and that under Virginia law an exception similar to the one claimed by plaintiff does exist. **See Cramer v. Clutchfield**, 648 F.2d 943, 496 (4th Cir. 1981)-(diversity case applying Virginia law). However, the Court in **Morrison** did not specifically adopt or even refer to such an exception. **Even if the Court did adopt the exception as the federal common law, it would not affect the outcome in this case.**

he alleges were maliciously brought against him by defendant, the aforesaid rule precludes the instant action and defendant is entitled to judgment as a matter of law.

The Court additionally finds that defendant's motion to dismiss for lack of jurisdiction and for summary judgment (**see** pleading no. 53 and Order—pleading no. 68) should be granted on the grounds that he (Mullinnix) did not act under color of state law. **See Calvert v. Sharp,** 748 F.2d 861 (4th Cir. 1985). To be successful in an action brought pursuant to 42 U.S.C. § 1983, a plaintiff must allege and show the defendant acted under color of law in depriving him of his rights. 42 U.S.C. § 1983. Therefore, as a general rule, an action cannot be maintained against a private individual under this section. An exception exists where the plaintiff alleges and shows that the private individual acted in concert with state officers. A showing that the individual was a willful participat in a joint action with the state or its agents is sufficient. **Dennis v. Sparks,** 449 U.S. 24, 27, 66 L.Ed.2d 185, 101 S.Ct. 183 (1980).

In the instant action, plaintiff alleges defendant conspired with police. This allegation is sufficient to withstand a motion to dismiss for failure to state a claim. However, mere conclusory allegations of a conspiracy are insufficient to withstand an adequately supported motion for summary judgment. **Fullman v. Graddick,** 739 F.2d 553, 556 (11th

---

[1]Continued

Plaintiff's allegations, that defendant fraudulently and/or falsely testified in the state courts, are conclusory and insufficient to support the exception plaintiff alleges. First, his allegations of fraudulent testimony in the district court is irrelevant due to his subsequent conviction in the superior court after a trial de novo. Second, he fails to allege or show the materiality or relevancy of the alleged false testimony in the superior court. Thus, the Court finds that plaintiff's allegations are insufficient to withstand defendant's motion for summary judgment.

In any event, plaintiff's allegations that his convictions were based on fraudulent and false testimony necessarily calls into question the validity of his convictions. Such claims are properly pursued under 28 U.S.C. § 2254 as they sound in habeas corpus, and are, therefore, subject to the exhaustion requirement. Since there has been no showing of exhaustion on these claims, the instant action would be required to be stayed pending such exhaustion. **Hamlin v. Warren,** 664 F.2d 29 (4th Cir. 1981), **cert. denied,** 455 U.S. 911 (1982). Thus, the Court finds that the exception plaintiff alleges should not be applied in the instant case to preclude summary judgment for the defendant.

Cir. 1984); **Fonda v. Gray,** 707 F.2d 435, 438 (9th Cir. 1983); **Henzel v. Gerstein,** 608 F.2d 654, 659 (5th Cir. 19870). Review of defendant's affidavit (pleading no. 96) in support of his motion for summary judgment reveals that his version of his participation in plaintiff's prosecution would be sufficient to overcome plaintiff's conclusory allegations of conspiracy. Thus, the Court finds that plaintiff's claim against defendant Mullinnix must fail for lack of sufficient allegations and proof that he formulated a "joint plan of action" with state officials. **Scott v. Greenville County,** 716 F.2d 1409 (4th Cir. 1983).

In addition to defendant's motion for summary judgment, several other motions are pending before the Court which should be addressed. First, plaintiff moves for the Court to order defendants to furnish him with the distance between the curb and the doorway at the Silver Fox Lounge, the scene of his arrest. (Pleading no. 117.) Defendants oppose this motion. (Pleading no. 118.) The record reveals that on August 24, 1984, plaintiff made a similar motion pursuant to rule 34 to enter the Silver Fox Lounge to take measurements. (Pleading no. 105.) The Court denied the motion on the basis that plaintiff had failed to show relevancy or that defendants were in control of the premises. (Pleading no. 109.) Since plaintiff has not presented the Court with any new evidence on this issue, the Court will deny his present motion for the same reasons and for the reason that plaintiff has not shown that he is unable to obtain this measurement himself.

Second, plaintiff moves for a default judgment against defendant Mullinnix pursuant to Fed.R.Civ.P. 37 for failure to comply with a Court Order dated September 28, 1984. (Pleading no. 120.) (**See**, Pleading nos. 114,116; and 119.) Specifically, he alleges that defendant failed to answer an interrogatory requesting the distance from the Silver Fox Lounge to the state right-of-way. (Pleading nos. 31;14.) He additionally alleges that a substantial number of defendant's answers are evasive or incomplete. **Id.** Review of this Court's September 28, 1984 Order reveals that defendent Mullinnix was ordered to serve plaintiff with answers to interrogatories 17-37 (pleading no. 92) within ten (10) days. (Pleading no. 109.) On October 5, 1984, defendant responded to interrogatories 20-37. (Pleading no. 110.) (Defendant did not respond to nos. 17, 18 and 19, but these had previously been answered. (Pleading nos. 98 and 111.) Interrogatory no. 31 requested the defendant to furnish the distance from the Lounge to the right-of-way. Defendant responded that he was unable to do so because he did not know where the right-of-way ended. (Pleading no. 110.) In light of this Court's prior findings that plaintiff has failed to show the defendant has control of the Silver Fox Lounge or the relevancy of this information, the Court finds defendant's objec-

tion to this interrogatory sufficient. Fed.R.Civ.P. 33(b). (Pleading no. 109.) As to the evasive and incomplete nature of the defendant's answers, plaintiff's conclusory allegations are insufficient to support his motion. Thus, the Court finds that plaintiff's motion for a default judgment should be denied.

Third, there is a pending motion by plaintiff for the Court to order defendants to produce certain transcripts from the state court criminal proceedings. (Pleading no. 76.) Plaintiff has not proffered to the Court any evidence indicating the relevance of these transcripts, nor has he informed the Court why he is unable to obtain these public records on his own. Therefore, the motion will be denied.

Finally, there are two motions in the record that have not been ruled upon by the Court despite subsequent proceedings and orders. The first is a motion by defendant Mullinnix, filed October 19, 1983, wherein he moves to dismiss this action as to him for failure of the plaintiff to prosecute and to comply with an Order of this Court. (Pleadings nos. 38 and 39.) Co-defendants Ellis and Cox had filed a similar motion on October 3, 1984. (Pleadings nos. 33 and 34.) On November 4, 1984, this Court denied the co-defendants' motion without specifically mentioning defendant Mullinnix's motion. Since both motions are based on the same ground for relief, the Court finds that the motion of defendant Mullinnix should be denied for the same reasons as was his co-defendants. Second, plaintiff has pending a motion for a default judgment against defendants Ellis and Cox. (Pleading no. 41.) After reviewing the motion, the Court finds it to be frivolous and therefore will deny it.

IT IS THEREFORE RECOMMENDED that defendant Mullinnix's motion to dismiss and for summary judgment be granted.

IT IS ORDERED that plaintiff's motion for defendants to furnish a certain distance at the Silver Fox Lounge be, and the same hereby is, denied.

IT IS FURTHER ORDERED that plaintiff's motion for a default judgment against defendant Mullinnix pursuant to rule 37, Fed.R.Civ.P., be, and the same hereby is, denied.

IT IS FURTHER ORDERED that plaintiff's motion for defendants to produce the transcripts of the state court criminal proceedings be, and the same hereby is, denied.

IT IS FURTHER ORDERED that defendant Mullinnix's motion to dismiss for failure of plaintiff to prosecute and to comply with an Order of this Court be, and the same hereby is, denied.

IT IS FURTHER ORDERED that plaintiff's motion for a default judgment against defendants Ellis and Cox be, and the same hereby is, denied.

_____

United States Magistrate

August 1, 1985

A True Copy

Teste:

J.P. Creekmore, Clerk

By:

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

| | | |
|---|---|---|
| GRAYDON ROGER BOLES, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | C-83-613-G |
| | ) | |
| T. E. ELLIS, T. D. COX and DANNA MULLINNIX, | ) | |
| | ) | |
| | ) | |
| Defendants. | ) | |

ORDER

On August 1, 1985, the United States Magistrate's Findings and Recommendation was filed and notice was served on the parties pursuant to 28 U.S.C. § 636. Thereafter, the Court received plaintiff's objections to parts of the Magistrate's Findings and Recommendation. Defendant Mullinnix filed a response in support of the Recommendation.

The Court has appropriately reviewed plaintiff's objections de novo and finds that they do not change the substance of the Magistrate's rulings which are affirmed.

IT IS THEREFORE ORDERED that pursuant to the Magistrate's Findings and Recommendation, defendant Mullinnix's motion to dismiss and for summary judgement is granted, and this defendant be, and the same hereby is, dismissed from this lawsuit.

United States District Judge

September 19, 1985

A True Copy
Teste:
J.P. Creekmore, Clerk
By:

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

| | | |
|---|---|---|
| GRAYDON ROGER BOLES, Plaintiff, | ) | CIVIL ACTION NO. C-83-613-G |
| v. | ) | |
| | ) | **MEMORANDUM** |
| T. E. ELLIS, et al, Defendants. | ) | |

This matter was scheduled for final pretrial conference in the United States Courthouse, Greensboro, North Carolina, February 24, 1986. The plaintiff appeared pro se. Kenneth Jones, Esq., appeared for the defendants.

Plaintiff's motion for leave to obtain medical reports, X-rays, etc., was denied on the basis that the reports are the plaintiff's reports from his doctor and the plaintiff should be able to obtain those without an order from the Court.

Plaintiff's motion entitled "Motion for Order to Compel Discovery," filed February 14, 1984, was denied.

Plaintiff's motion entitled "Relief from Court Order" was not heard on the grounds that the Court order did not pertain to the plaintiff but to Mr. Mullinnix.

The plaintiff's motion to amend the complaint with respect to punitive damages was allowed.

The Court approved the pretrial order filed in this case and set the case for trial the first case on March 24, 1986. In this case, a motion in limine is pending filing by the defendants. The plaintiff shall respond to that motion on or before March 4, 1986. The parties shall file trial briefs, if any, proposed jury voir dire questions and proposed jury instructions on or before March 7, 1986.

---

I, Betty P. Julian, Official Reporter in the United States District Court for the Middle District of North Carolina, do hereby certify that the foregoing is a true transcript from my notes of the entries made in

the above-entitled Case No. C-83-613-G, before and by Judge Richard C. Erwin on February 24, 1986, in Greensboro.

Given under my hand this 4th day of March, 1986.

_____

Official Reporter

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

| | | |
|---|---|---|
| GRAYDON ROGER BOLES, | ) | No. C-83-613-G |
| | ) | |
| Plaintiff, | ) | |
| | ) | MOTION TO STAY |
| v. | ) | TRIAL PENDING |
| | ) | APPEAL. |
| T. E. ELLIS, et al, | ) | |
| | ) | |
| Defendants. | ) | |

Pursuant to Rule 8 of the Federal Rules of Appellate Procedure the plaintiff moves the court for a stay of trial pending appeal.

GROUNDS

Fraud and other improper means were used to obtain plaintiff's conviction in Superior Court and this court has allowed defendant's Motion in Limine by court order date stamped 12 March 1986 which prohibits plaintiff's commenting on issue of probable cause. Material evidence has been excluded by trial court judge which unequivocally proves plaintiff's case on issue of probable cause.

## RELIEF SOUGHT

Plaintiff prays for order staying trial until decision is reached pertaining to admissibility of evidence and reversal of order denying plaintiff's Rule 60 (F.R.Civ.R.) relief.

Graydon R. Boles

Graydon Roger Boles
10117 North Tenth Street
Tampa, Florida 33612
Phone (813) 972-3093

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

| | | |
|---|---|---|
| GRAYDON ROGER BOLES, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | C-83-613-G |
| | ) | |
| T. E. ELLIS, et al, | ) | |
| | ) | |
| Defendants. | ) | |

ORDER

Plaintiff's Motion to Stay Trial Pending appeal pursuant to Rule 8 of the Federal Rules of Appellate Procedure is denied, based on the matters stted in this court's order on defendants' Motion in Limine.

The case remains on trial for 9:30 a.m., March 24, 1986.
IT IS SO ORDERED.

_____
United States District Judge

March 17, 1986

A True Copy

Teste:

J.P. Creekmore, Clerk

By:

_____
Deputy Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-3827

Graydon Roger Boles,

Appellant,

versus

T. E. Ellis,

Appellee.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Richard C. Erwin, District Judge. (C/A No. 83-613-G)

Submitted: March 19, 1986 Decided: April 11, 1986

Before RUSSELL, SPROUSE, and ERVIN, Circuit Judges.

(Graydon Roger Boles, Appellant Pro Se. Kenneth R. Keller, for Appellee.)

PER CURIAM:

Graydon Roger Boles appeals from a ruling of the district court, made at the final pretrial conference in this case, refusing to reconsider the entry of summary judgment in favor of defendant Mullinnix. We dismiss the appeal for lack of jurisdiction.

Under 28 U.S.C. § 1291, this Court has jurisdiction to review final decisions of the district court. A final judgment disposes of all issues in dispute as to all parties. "Federal appellate jurisdiction generally depends on the existence of a decision by the District Court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" **Coopers & Lybrand v. Livesay,** 437 U.S. 463, 467 (1978) (quoting **Catlin v. United States,** 324 U.S. 229, 233 (1945). In this case, the district court's orders granting summary judgment for Mullinnix and refusing to reconsider the grant of summary judgment left the claims against defendants Ellis and Cox unresolved. The order which Boles seeks to appeal is thus not a "final" one as that term is used in § 1291. Nor does that order contain a direction for the entry of final judgment under Fed. R. Civ. P. 54(b) or a certification for interlocutory appeal under 28 U.S.C. § 1292(b). The order is not appealable under the exceptions provided in 28 U.S.C. § 1292(a) or in **Cohen v. Beneficial Industrial Loan Corp.,** 337 U.S. 541 (1949).

We accordingly dismiss the appeal for lack of jurisdiction. We dispense with oral argument because the dispositive issues recently have been decided authoritatively.

DISMISSED

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 86-3827

Graydon Roger Boles,

Appellant,

versus

T. E. Ellis,

Appellee.

---

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Richard C. Erwin, District Judge

---

Upon consideration of the appellant's pro se petition for rehearing.

IT IS ORDERED that leave to file petition for rehearing is granted and petition for rehearing is denied.

Entered at the direction of Judge Ervin for a panel consisting of Judge Russell, Judge Sprouse and Judge Ervin.

For the Court

JOHN M. GREACEN
CLERK

# APPENDIX H

**§ 14-134. Trespass on land after being forbidden; license to look for estrays.**

If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both: Provided, that if any person shall make a written affidavit before a magistrate of the county that any of his cattle or other livestock (which shall be specially described in such affidavit) have strayed away, and that he has good reason to believe that they are on the lands of a certain other person, then the magistrate may, in his discretion, allow the affiant to enter on the premises of such person with one or more servants, without fire-arms, in the daytime (Sunday excepted), between the hours of sunrise and sunset, and make search for his estrays for such limited time as to the magistrate shall appear reasonable. The only effect of such license shall be to protect the persons entering from indictment therefor, and the license shall have this effect only where it is made bona fide and the entry is effected without any damage except such as may be necessary to conduct the search. (1866, c. 60; Code, s. 1120; Rev., s. 3688; C.S., s. 4305; 1963, c. 1106; 1969, c. 1224, s. 12; 1973, c. 108, s. 3.)

Cross References. - As to forcible trespass, see § 14-126.

Legal Periodicals. - For note as to trespass prosecution not being discrimination by State, see 37 N.C.L. Rev. 73 (1958).

For discussion of the distinctions between the common-law crime of forcible trespass to real property and entry after being forbidden, see 39 N.C.L. Rev. 121 (1961).

For article dealing with the legal problems in southern desegregation, see 43 NC. Rev. 689 (1965).

Purpose. - This section is designed to protect possession regardless whether it be actual or constructive. State V. Baker, 231 N.C. 136, 56 S.E. 2d 424 (1949).

The law does not look to the motive of a proprietor but to the wrongful invasion of his property and to the disturbance of his right to undisputed possession. State v. Cobb, 262 N.C. 262, 136 S.E. 2d 674 (1964).

Essential Ingredients of Offense. - To constitute trespass on the land of another after notice or warning under this section, three essential

ingredients must coexist: (1) The land must be the land of the prosecutor in the sense that it is in either his actual or constructive possession; (2) the accused must enter upon the land intentionally; and (3) the accused must do this after being forbidden to do so by the prosecutor. State v. Baker, 231 N.C. 136, 56 S.E. 2d 424 (1949).

To consititute the offense forbidden by this section and with which defendants are charged there must be an entry on land after being forbidden; and such entry must be wilful, and not from ignorance, accident, or under a bona fide claim of right or license. State v. Cobb, 262 N.C. 262, 136 S.E. 2d 674 (1964).

**§ 14-444. Intoxicated and disruptive in public.**

(a) It shall be unlawful for any person in a public place to be intoxicated and disruptive in any of the following ways:

(1) Blocking or otherwise interfering with traffic on a highway or public vehicular area, or

(2) Blocking or lying across or otherwise preventing or interfering with access to or passage across a sidewalk or entrance to a building, or

(3) Grabbing, shoving, pushing or fighting others or challenging others to fight, or

(4) Cursing or shouting at or otherwise rudely insulting others, or

(5) Begging for money or other property.

(b) Any person who violates this section shall be guilty of a misdemeanor punishable by a fine of not more than fifty dollars ($50.00) or imprisonment for not more than 30 days. Notwithstanding the provisions of G.S. 7A-273(1), a magistrate is not empowered to accept a guilty plea and enter judgment for this offense. (1977, 2nd Sess., c. 1134, s. 1.)

CASE NOTES

**Mere public intoxication standing alone is no longer unlawful,** and in order for there to be a chargeable offense, the intoxicated person must be disruptive in one or more of the ways described in subdivisions (1)-(5) of subsection (a). State v. Cooke, 49 N.C. App. 384,271 S.E.2d 561 (1980).

Section Not Violated. — This statute, making it unlawful for any person in a public place to be intoxicated and disruptive by cursing or

**Section Not Violated.** — This statute, making it unlawful for any person in a pubic place to be intoxicated and disruptive by cursing or shouting at or otherwise rudely insulting others, was not violated by defendant's conduct in standing in a motel parking lot in an intoxicated condition, looking up toward the sky, and shouting God is alive and God is in heaven and other words which sounded like a foreign language. State v. Cooke, 49 N.C. App. 384, 271 S.E.2d 561 (1980).

Supreme Court, U.S.
FILED
OCT 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-517

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER 1986 TERM

GRAYDON ROGER BOLES,

PETITIONER

V.

T.E. ELLIS, T.D. COX &
DANNA MULLINNIX,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

# BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

Kenneth Kyre, Jr.
Nichols, Caffrey, Hill,
Evans & Murrelle
P.O. Box 989
Greensboro, N.C. 27402
Telephone (919) 379-1390

Attorney for Respondent
Mullinnix

Of Counsel:
G. Marlin Evans

## QUESTIONS PRESENTED

I. Did the Court of Appeals correctly refuse to hear petitioner's interlocutory appeal where the District Court did not direct entry of final judgment under Rule 54(b), Fed. R. Civ. P., nor enter a certification for interlocutory appeal under 28 U.S.C. §1292(b)?

II. Should this Court grant certiorari to review a decision by the Court of Appeals which did not depart from the usual and accepted course of judicial proceedings?

TABLE OF CONTENTS

Questions Presented . . . . . i

Table of Contents . . . . . .ii

Table of Authorities . . . . . iii

Opinions Below . . . . . 1

Statutes Involved . . . . . 2

Statement of the Case . . . . . 2

Summary of Argument . . . . . .11

Argument . . . . . .12

1. There Being No Entry of Final Judgment Pursuant to Rule 54(b), Fed. R. Civ. P., and No Certification for Interlocutory Appeal Pursuant to 28 U.S.C. §1292(b), the Appeal by Petitioner to the Court of Appeals Was Interlocutory, and the Court of Appeals Properly Dismissed the Appeal . . . . . .12

2. The Dismissal of Petitioner's Appeal by the Court of Appeals Because it was Interlocutory Does Not Involve or Present Any Special and Important Reasons for Granting the Petition for Certiorari . . . . . .16

Conclusion . . . . . .18

Appendix . . . . . A 1

Certificate of Service

TABLE OF AUTHORITIES

Balsbaugh v. City of Westland, 458 F.2d 1358 (6th Cir. 1972) . . . .12, 14

Catlin v. United States, 324 U.S. 229, 65 S.Ct. 631, 89 L.Ed. 911 (1945) . . . . . .13

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) . . . . .14

Lamp v. Andrus, 657 F.2d 1167 (10th Cir. 1981) . . . . . .13, 15

Luckett v. Spivy, 490 F.2d 87 (5th Cir. 1974) . . . . . .12, 14

Montgomery v. Hall, 592 F.2d 278 (5th Cir. 1979) . . . . . .17

Moody v. Kapica, 548 F.2d 133 (6th Cir. 1976) . . . . . .14

Oak Construction Co. v. Huron Cement Co., 475 F.2d 1220 (6th Cir. 1973) . . . . . .15

Redding v. Walsh, 449 F.2d 1301 (3rd Cir. 1971) . . . . . .14

Sanchez v. Breed, 464 F.2d 448 (9th Cir. 1972) . . . . . .14

Schnur & Cohan, Inc. v. McDonald, 328 F.2d 103 (4th Cir. 1964) . .13, 14

Simons v. Gorsuch, 715 F.2d 1248 (7th Cir. 1983) . . . . . .17

TMA Fund, Inc. v. Biever, 520 F.2d 639 (3rd Cir. 1975) . . . . . .15

28 U.S.C. §1291 . . . . . 2, 13

28 U.S.C. §1292 . . . . . .14

28 U.S.C. §1292(b) . . . . . 2, 11, 12, 14

Rule 54(b), Fed R. Civ. P. . . 2, 11, 12, 13

Rule 60(b)(3), Fed. R. Civ. P. . . . . .17

Rule 17.1, Supreme Court Rules . . . . . .16

## OPINIONS BELOW

The Magistrate's Findings and Recommendation and Order entered on August 1, 1985 appears in petitioner's Appendix (A-1). The United States District Judge's Order entered on September 19, 1985, following the Magistrate's recommendations and dismissing respondent Mullinnix appears in petitioner's Appendix (B-1). The District Judge's Order entered on October 15, 1985 denying petitioner's request for reconsideration of the dismissal appears in respondent's Appendix (A 1). The District Judge's decision on February 24, 1986, not to hear petitioner's motion under Rule 60(b)(3), Fed. R. Civ. P., and hence refusing to reconsider the earlier dismissal, appears in petitioner's Appendix (C-1). The decision of the Court of Appeals for the Fourth Circuit of which petitioner

seeks review was decided April 11, 1986,[1] and appears in petitioner's Appendix (F-1). The Order of the Court of Appeals for the Fourth Circuit entered on June 2, 1986, denying petitioner's petition for rehearing appears in petitioner's Appendix (G-1).

## STATUTES INVOLVED

28 U.S.C. §1291 (See Appendix, p. A 13).

28 U.S.C. §1292(b) (See Appendix, p. A 14).

Rule 54(b), Fed. R. Civ. P. (See Appendix, p. A 15).

## STATEMENT OF THE CASE

On July 7, 1983, the petitioner filed a complaint, pro se, against the respondent Mullinnix alleging a conspiracy in violation

---

[1]Petitioner incorrectly identifies the dismissal order as having been entered by the Fourth Circuit on May 15, 1986, but that apparently was the date that the Clerk's Office of the United States District Court for the Middle District of North Carolina received the appellate court's opinion and order dismissing the appeal.

of 42 U.S.C. §1985(3). Although the complaint was somewhat unintelligible, it appeared petitioner was asserting that respondent Mullinnix, a private citizen, had brought a "malicious charge" against petitioner as part of a conspiracy with co-defendants T.E. Ellis and T.D. Cox, two High Point, North Carolina, police officers who allegedly falsely arrested him.[2]

The respondent Mullinnix moved to dismiss the complaint pursuant to Rule 12(b)(6), Fed. R. Civ. P., on August 29, 1983, arguing that petitioner's complaint offered merely conclusory allegations of conspiracy and that petitioner failed to allege any class-based animus. On November 4, 1983, United States Magistrate Russell A.

---

[2]The citation issued by the police officers charged petitioner with two misdemeanors: (1) Trespassing at the Silver Fox Grill and Lounge, and (2) being intoxicated and disruptive.

Eliason agreed that the petitioner had failed to state a claim under 42 U.S.C. §1985(3), but, taking into consideration that petitioner was proceeding pro se, he noted that petitioner could have and should have pled a violation of 42 U.S.C. §1983, and therefore deemed that petitioner's action was one under §1983. The Magistrate also refused to dismiss the claims based upon the conclusory complaint, citing the less stringent standards for pro se litigants in the Fourth Circuit. The Magistrate did order that the petitioner file a more definite statement as to the facts, with the respondent having the right to renew his motion to dismiss thereafter.

On November 25, 1983, as a result of a motion by Ellis and Cox, the Magistrate again ordered petitioner to set out in detail in a supplemental pleading the facts pertinent to the allegations of violations

of constitutional rights. After further supplemental pleadings by petitioner,[3] the respondent Mullinnix renewed his motion to dismiss, noting that petitioner had admitted that he was found guilty of the two misdemeanor violations with which he had been charged. A North Carolina state district court had found petitioner guilty and, subsequently, pursuant to an appeal and trial de novo, a North Carolina state superior court jury had found petitioner guilty. Respondent Mullinnix argued that he could not have unconstitutionally violated petitioner's constitutional rights by allegedly conspiring to falsely charge him

---

[3]These supplemental pleadings by petitioner again asserted a violation of 42 U.S.C. §1985, but the Magistrate dismissed that cause of action by Order dated January 18, 1984, leaving as to respondent Mullinnix the claim of conspiring with the two police officers to maliciously charge petitioner with the crime of trespassing in violation of 42 U.S.C. §1983.

with trespassing when petitioner was convicted of that crime.

The United States Magistrate on June 22, 1984, denied respondent Mullinnix's motion to dismiss for failure to state a cause of action, but he directed at the same time that respondent submit a motion for summary judgment. Respondent Mullinnix did file a motion for summary judgment on July 16, 1984, and on August 1, 1985, the Magistrate recommended to the United States District Judge that respondent's motion for summary judgment be granted and that the action against respondent Mullinnix be dismissed. (Petitioner's Appendix, A-1). The Magistrate found, first, that the petitioner's conviction of the charges which he claimed were maliciously brought precluded his action, and second, that the petitioner had failed to present evidence contradicting respondent Mullinnix's

affidavit indicating that Mullinnix did not engage in a conspiracy with the High Point police officers, and hence, petitioner failed to come forward with evidence that respondent Mullinnix, a private citizen, acted under color of state law. On September 19, 1985, United States District Judge Richard C. Erwin agreed with the Magistrate's findings and recommendations and ordered that summary judgment be granted and respondent Mullinnix be dismissed from the lawsuit. (Petitioner's Appendix, B-1). Judge Erwin on October 15, 1985 denied petitioner's request for reconsideration of the dismissal. (Respondent's Appendix, A 1).

Petitioner subsequently moved on December 31, 1985 for relief from the District Court's order of dismissal pursuant to Rule 60(b)(3), Fed. R. Civ. P. Respondent Mullinnix opposed petitioner's motion and requested the District Court to

direct entry of a final judgment as to respondent pursuant to Rule 54(b), Fed. R. Civ. P. (Respondent's Appendix, A 3, A 9). The court did not enter such a final judgment.

Although the District Judge held a final pretrial conference on February 24, 1986, as to the remaining claims petitioner had against Ellis and Cox, the Judge at that hearing declined to hear petitioner's motion for "Relief From Court Order." (Petitioner's Appendix, C-1). On March 17, 1986, petitioner filed a notice of appeal to the United States Court of Appeals for the Fourth Circuit from the District Judge's decision not to hear petitioner's Rule 60 motion at the pretrial conference. (Respondent's Appendix, A 12).

The trial of petitioner's claims against Ellis and Cox began on March 24, 1986, the District Court having denied

petitioner's motion for a stay pending his appeal. (Petitioner's Appendix, D-1 & E-1). At the close of petitioner's evidence, on March 25, 1986, the District Court granted the remaining defendants' motion for a directed verdict, and on April 8, 1986, the court entered a judgment dismissing petitioner's action with prejudice.

The United States Court of Appeals for the Fourth Circuit dismissed petitioner's appeal for lack of jurisdiction on April 11, 1986, because the District Court's order granting summary judgment in favor of respondent Mullinnix from which petitioner appealed was not a final one,[4] the claims against Ellis and Cox having remained

---

[4]The Fourth Circuit interpreted the ruling by the District Court at the final pretrial conference as one refusing to recorsider the entry of summary judgment in favor of Mullinnix.

unresolved at the time of the notice of appeal. (Petitioner's Appendix, F-1). Petitioner petitioned the Court of Appeals for rehearing on April 22, 1986, and on June 2, 1986, the Fourth Circuit denied petitioner's petition for rehearing. (Petitioner's Appendix, G-1).

Petitioner petitioned this Court for a Writ of Certiorari to review the Fourth Circuit's April 11, 1986, opinion and order dismissing petitioner's appeal, but the petition which respondent Mullinnix's counsel received August 29, 1986, was returned undocketed to petitioner on September 3, 1986 by the Office of the Clerk of the Supreme Court because of failure to comply with the Court's Rules of Procedure. On September 27, 1986, respondent Mullinnix's counsel received a subsequent petition for Writ of Certiorari from petitioner.

## SUMMARY OF ARGUMENT

The petitioner's appeal to the Court of Appeals was from an order which was not final because the order did not dispose of remaining claims against co-defendants. With no entry of a final judgment pursuant to Rule 54(b), Fed. R. Civ. P., and no certification for an interlocutory appeal pursuant to 28 U.S.C. §1292(b), the Court of Appeals followed established law in dismissing the appeal, and this Court therefore should not grant the petition for a Writ of Certiorari.

## ARGUMENT

1. THERE BEING NO ENTRY OF FINAL JUDGMENT PURSUANT TO RULE 54(b), FED. R. CIV. P., AND NO CERTIFICATION FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. §1292(b), THE APPEAL BY PETITIONER TO THE COURT OF APPEALS WAS INTERLOCUTORY, AND THE COURT OF APPEALS PROPERLY DISMISSED THE APPEAL.

Following the United States Magistrate's recommendations, the District Court granted respondent Mullinnix's motion for summary judgment and ordered that he be dismissed from this lawsuit. The Court was only considering Mullinnix's motion, and Ellis and Cox remained in the lawsuit as defendants. The Court's order having adjudicated the rights and liabilities of fewer than all of the parties, it was not "final." Luckett v. Spivy, 490 F.2d 87 (5th Cir. 1974); Balsbaugh v. City of Westland,

458 F.2d 1358 (6th Cir. 1972); Schnur & Cohan, Inc. v. McDonald, 328 F.2d 103, 104 (4th Cir. 1964); Rule 54(b), Fed. R. Civ. P.

A judgment is final when the district court enters a decision or order which ends the litigation, leaving nothing else to be done except executing the judgment. Catlin v. United States, 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911, 916 (1945); Lamp v. Andrus, 657 F.2d 1167, 1168 (10th Cir. 1981). At the time of petitioner's notice of appeal, the litigation was still proceeding as to Ellis and Cox.

Even though requested to do so by respondent Mullinnix, the District Court did not direct entry of a final judgment as to respondent pursuant to Rule 54(b), Fed. R. Civ. P. With the order dismissing Mullinnix being interlocutory, the Fourth Circuit had no jurisdiction to hear petitioner's appeal under 28 U.S.C. §1291. Lamp, 657 F.2d at

1168; Moody v. Kapica, 548 F.2d 133 (6th Cir. 1976); Luckett, 490 F.2d at 87; Sanchez v. Breed, 464 F.2d 448 (9th Cir. 1972); Balsbaugh, 458 F.2d at 1358; Redding v. Walsh, 449 F.2d 1301, 1302 (3rd Cir. 1971); McDonald, 328 F.2d at 104.

Under certain circumstances, an appellate court can hear appeals involving interlocutory orders. See 28 U.S.C. §1292. See also Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). However, none of the provisions of 28 U.S.C. §1292 were applicable to petitioner's appeal nor were the Cohen exceptions. Particularly, the District Court did not enter any order pursuant to 28 U.S.C. §1292(b) finding that the dismissal order or the Court's refusal to reconsider the dismissal involved a controlling question of law as to which there was substantial ground for difference

of opinion and that immediate appeal from the order would have materially advanced the ultimate termination of the litigation.

Appellate jurisdiction is initially determined as of the date the notice of appeal is filed, and therefore, all appellate jurisdictional prerequisites, including the need for a judgment to be final, must be satisfied as of that date. Lamp, 657 F.2d at 1168; TMA Fund, Inc. v. Biever, 520 F.2d 639, 642 (3rd Cir. 1975); Oak Construction Co. v. Huron Cement Co., 475 F.2d 1220, 1221 (6th Cir. 1973). With the district court's order of dismissal (and its refusal to reconsider the dismissal) not being deemed final as of March 17, 1986, the date on which the petitioner filed his notice of appeal, the Court of Appeals lacked jurisdiction to hear his appeal and properly dismissed it.

2. THE DISMISSAL OF PETITIONER'S APPEAL BY THE COURT OF APPEALS BECAUSE IT WAS INTERLOCUTORY DOES NOT INVOLVE OR PRESENT ANY SPECIAL AND IMPORTANT REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI.

The Supreme Court's decision as to whether to grant a petition for a Writ of Certiorari is purely discretionary, and the Court limits the grant of such a petition to when there are special and important reasons therefor. Rule 17.1, Supreme Court Rules. Petitioner has presented no such special and important reasons. The dismissal of petitioner's appeal did not conflict with any court of appeal's decision or with a decision of the Supreme Court, nor did it depart from the accepted and usual course of judicial proceedings, nor did it present an important question of federal law which the Supreme Court should decide. To the

contrary, the Court of Appeals applied established law in dismissing the appeal.

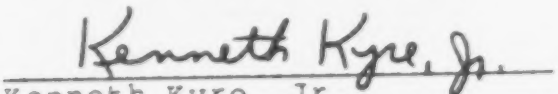
The questions presented for review by petitioner in his petition need not be considered by this Court in light of the basis of the Fourth Circuit's opinion of which petitioner now seeks review. Even if petitioner had properly brought before the Court of Appeals the issue of the District Court's refusal to grant petitioner's motion for relief under Rule 60(b)(3), petitioner has not shown any abuse of discretion by the District Court in not granting the motion. See Simons v. Gorsuch, 715 F.2d 1248, 1253 (7th Cir. 1983) (appellate court's role in reviewing the denial of a Rule 60(b) motion is to determine if the lower court abused its discretion); Montgomery v. Hall, 592 F.2d 278 (5th Cir. 1979) (movant under Rule 60(b)(3) must establish fraud by clear and convincing evidence). Therefore, even

considering the petitioner's arguments regarding Rule 60(b)(3), he has shown no special and important reason for the granting of his petition for a Writ of Certiorari.

## CONCLUSION

For the foregoing reasons, the Court should deny and dismiss petitioner's petition for a Writ of Certiorari.

Respectfully submitted,



Kenneth Kyre, Jr.
Nichols, Caffrey, Hill,
Evans & Murrelle
P.O. Box 989
Greensboro, N.C. 27402
Telephone (919) 379-1390

Attorney for Respondent
Mullinnix

Of Counsel:
G. Marlin Evans

## INDEX TO APPENDIX

Order of United States District Court, dated October 15, 1985 . . . . A 1

Response of Defendant Dana Mullinnix to Plaintiff's Motion for Relief from Court Order, and Memorandum, dated January 22, 1986 . . . . . A 3

Notice of Appeal, dated March 8, 1986 and filed March 17, 1986 . . . . . .A 12

28 U.S.C. §1291. . . . . .A 13

28 U.S.C. §1292(b) . . . . . .A 14

Rule 54(b), Fed. R. Civ. P.. . . . . .A 15

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

| | | |
|---|---|---|
| GRAYDON ROGER BOLES, Plaintiff, | ) | |
| V. | ) | C-83-613-G |
| T.E. ELLIS, et al., Defendants | ) | |

ORDER

Plaintiff has submitted a paperwriting requesting reconsideration of this Court's Order of September 19, 1985. That Order, which affirmed the Magistrate's Findings and Recommendation of August 1, 1985, granted Dana Mullinnix's motion to dismiss and for summary judgment and dismissed him as a party to this lawsuit. After reviewing plaintiff's paperwriting, the Court in its discretion denies same.

IT IS THEREFORE ORDERED that plaintiff's paperwriting, filed October 3, 1985, requesting reconsideration of this Court's Order of September 19, 1985 be, and

the same hereby is, denied.

Richard C. Erwin
United States
District Judge

October 15, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION
No. C-83-613-G

| | |
|---|---|
| GRAYDON ROGER BOLES,<br><br>Plaintiff,<br><br>vs.<br><br>T.E. ELLIS, T.D. COX, AND DANNA MULLINNIX,<br><br>Defendants. | RESPONSE OF DEFENDANT DANA MULLINNIX TO PLAINTIFF'S MOTION FOR RELIEF FROM COURT ORDER, AND MEMORANDUM |

The defendant Dana Mullinnix hereby responds to plaintiff's Motion for Relief from Court Order as follows:

1. On December 12, 1983, the defendant Dana Mullinnix filed in this case a Renewed Motion to Dismiss, and in apparent response thereto, the plaintiff served an objection on February 19, 1984. On July 16, 1984, defendant Mullinnix filed a motion for summary judgment, and in response thereto, the plaintiff served on August 14, 1984, his objection to the motion. Along with his

response, the plaintiff served two affidavits in support of his opposition to the motion. On August 28, 1984, the plaintiff served a third affidavit.

2. United States Magistrate Russell A. Eliason entered his Findings and Recommendation and Order on August 1, 1985, wherein he concluded that defendant Mullinnix's motions for dismissal and for summary judgment should be granted. On August 14, 1985, the plaintiff served his objection to the Magistrate's Findings and Recommendation and, in an accompanying brief, he detailed the reasons for objecting to the Findings and Recommendation. The defendant Dana Mullinnix filed on August 26, 1985, his response to the plaintiff's objections.

3. On September 19, 1985, United States District Judge Richard C. Erwin entered an order granting defendant

Mullinnix's motions to dismiss and for summary judgment pursuant to the Magistrate's Findings and Recommendation, and he dismissed defendant Mullinnix from the lawsuit.

4. By letter dated October 2, 1985, the plaintiff requested the Court to reconsider its order of September 19, 1985. United States District Judge Richard C. Erwin, by order dated October 15, 1985, denied plaintiff's request for reconsideration of the previous order.

5. The plaintiff served on December 31, 1985, a Motion for Relief from Court Order. The plaintiff styled his motion as being pursuant to Rule 60(b)(3) of the Federal Rules of Civil Procedure. That rule provides that the Court may relieve a party from a judgment or order based upon "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation,

or other misconduct of an adverse party." Although the plaintiff styles his motion as if he were requesting relief from the Court order upon new grounds, a review of his brief served in support of his motion clearly reflects that all of the questions and arguments now advanced by plaintiff have previously been raised and considered by the Court.

6. In effect, plaintiff's current motion is simply a motion to reconsider the Court's order of September 19, 1985, which granted defendant Mullinnix's motions to dismiss and for summary judgment. The very same issues and arguments raised in plaintiff's current motion were specifically raised in plaintiff's brief in support of his objection to the Magistrate's Findings and Recommendation, and Magistrate Eliason and Judge Erwin rejected those arguments. A litigant may not use Rule 60(b) merely to

relitigate the granting of summary judgment. Frito-Lay of Puerto Rico, Inc. v. Canas, 92 F.R.D. 384, 395 (D.Puerto Rico 1981). See also Mastini v. American Telephone & Telegraph Co., 369 F.2d 378, 379 (2d Cir. 1966), cert. denied, 387 U.S. 933, 18 L.Ed.2d 994, 87 S.Ct. 2055 (1967).

7. The plaintiff has made no showing whatsoever of a reason why the Court should reconsider and change its prior rulings as to defendant Mullinnix's motions to dismiss and for summary judgment. The Court has already denied a previous request by plaintiff to reconsider its rulings. No new issues or facts have been raised by plaintiff's present motion.

8. Defendant Mullinnix incorporates herein by reference his Response to Plaintiff's Objection to Magistrate's Findings and Recommendation filed with this Court on August 26, 1985.

9. The remedy provided by Rule 60(b) "is extraordinary and is only to be invoked upon a showing of exceptional circumstances." Compton v. Alton Steamship Co., 608 F.2d 96, 102 (4th Cir. 1979). The plaintiff has failed to show such exceptional circumstances.

10. The plaintiff must show that he has a meritorious claim. Square Construction Co. v. Washington Metropolitan Area Transit Authority, 657 F.2d 68, 71 (4th Cir. 1981). The plaintiff has previously failed to convince the Court that he has a meritorious claim, and he has presented nothing new to rectify this failure.

11. Additionally, for relief under Rule 60(b)(3), the plaintiff must show clear and convincing evidence of fraud. Brown v. Pennsylvania Railroad Co., 282 F.2d 522, 527 (3d Cir. 1960), cert. denied, 365 U.S. 818, 5 L.Ed.2d 696, 81 S.Ct. 690 (1961). Fraud,

misrepresentation, or other misconduct is not to be presumed. 7 Moore's Federal Practice, ¶60.24[5], at p. 60-217 (2d Ed. 1985). The plaintiff has failed to present any evidence of any alleged fraud or misrepresentation which would justify the Court to reverse its prior decisions dismissing defendant Mullinnix as a party to this lawsuit.

12. In the interest of finally concluding this case as to defendant Mullinnix, said defendant requests the Court to not only deny plaintiff's present motion which seeks relief from the Court's prior order, but he also requests the Court to enter an order containing an express determination that there is no just reason for delay for entry of a final judgment and containing an express direction for the entry of final judgment as to defendant Dana Mullinnix, pursuant to Rule 54(b) of the

Federal Rules of Civil Procedure.

13. Finally, because the plaintiff has failed to raise any new issues or present any new arguments in his most recent motion, and because it is, in effect, merely a motion for reconsideration of the Court's order of September 19, 1985, which the Court has already refused to reconsider, it is requested that, pursuant to Rule 11 of the Federal Rules of Civil Procedure, and 42 U.S.C. §1988, the Court award defendant Mullinnix his attorneys' fees and expenses incurred in opposing plaintiff's latest motion.

WHEREFORE, the defendant Dana Mullinnix respectfully requests the Court to grant the relief requested in paragraphs 12 and 13 above.

This the 22nd day of January, 1986.

G. Marlin Evans

Kenneth Kyre, Jr.

Attorneys for Defendant
Dana Mullinnix

OF COUNSEL:

NICHOLS, CAFFREY, HILL, EVANS & MURRELLE
Post Office Box 989
Greensboro, North Carolina 27402
Telephone No. (919) 379-1390

A 12

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

[FILED MAR 17 1986]

| | | |
|---|---|---|
| GRAYDON ROGER BOLES, Plaintiff, | ) | |
| | ) | Civil Action |
| V. | ) | File Number |
| | ) | C-83-613-G |
| T.E. ELLIS, et al., Defendants | ) | |

NOTICE OF APPEAL

Notice is hereby given that Graydon Roger Boles plaintiff above named hereby appeals to the United States Court of Appeals for the Fourth Circuit from the order denying consideration of the Rule 60 (F.R.Civ.P.) request entered in this action on the 24th day of February, 1986.

This the 8th of March, 1986

Graydon Roger Boles
10117 North Tenth Street
Tampa, Fla 33612
(813) 972-3093

28 U.S.C. §1291:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jursidiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. §1292(b):

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Rule 54(b), Federal Rules of Civil Procedure:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however desig- nated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Respondent in Opposition to Petition was served upon the petitioner and respondents Ellis and Cox on October 24, 1986, pursuant to Supreme Court Rules 22.1, 28.3, and 28.5(b) by depositing copies thereof in a United States post office with first-class postage prepaid, addressed as follows:

Mr. Graydon Roger Boles
10117 North Tenth Street
Tampa, Florida 33612
(Petitioner, pro se)

Mr. J. Reed Johnston, Jr.
Tuggle, Duggins, Meschan & Elrod
Post Office Drawer X
Greensboro, N.C. 27402
(Attorney for Respondents
Ellis and Cox)

This 24nd day of October, 1986.

Kenneth Kyre, Jr.

Kenneth Kyre, Jr.
Attorney for Respondent Mullinnix

Nichols, Caffrey, Hill,
Evans & Murrelle
Post Office Box 989
Greensboro, N.C. 27402
Telephone: (919) 379-1390